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No. 04-674

IN THE

Supreme Court of the United States

AMERICAN HOME PRODUCTS CORP., *et al.*
Petitioners,

v.

BRYAN D. COLLINS, *et al.*,
and JOHN W. STEWART, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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Pursuant to Rule 37.2 of the Rules of this Court, the Washington Legal Foundation (WLF) respectfully moves for leave to file the attached brief as *amicus curiae* in support of Petitioners. Counsel for Petitioners has consented to the filing of this brief. Counsel for Respondents declined to consent, thereby necessitating the filing of this motion.

WLF is a non-profit public interest law and policy center with supporters in all 50 states, including many in Mississippi. WLF regularly appears before federal and state courts to promote economic liberty, free enterprise, and a limited and

accountable government. In particular, WLF regularly files briefs in product liability cases in which the procedural fairness of suits filed against drug and medical device manufacturers can reasonably be called into question. *See, e.g., Howland v. Purdue Pharma LP*, 2004 Ohio 6552 (2004); *United States ex rel. Gilligan v. Medtronic, Inc.*, No. 03-4213 (6th Cir., dec. pending).

WLF fully supports Petitioners' request that the Court grant review of both of the Questions Presented in this Petition. WLF writes separately in order to emphasize its particular concern over the first Question Presented. WLF is concerned that the novel rule announced by the Fifth Circuit in this case and *Smallwood v. Illinois Central Railroad Co.*, 385 F.3d 568 (5th Cir. 2004) (*en banc*), will significantly impair the right of out-of-state defendants to remove cases to federal court pursuant to the federal courts' diversity jurisdiction -- thereby frustrating the intent of Congress that such cases be removable as a means of ensuring that out-of-state defendants can have their cases heard in an impartial forum. WLF is also concerned that the result of such impairment will be a significant increase in health-care costs in general, and the costs of vaccines in particular.

WLF is filing this brief because of its interest in promoting the welfare of the health care industry and the public at large; it has no direct interest, financial or other, in the outcome of this lawsuit. Because of its lack of direct economic interests, WLF believes that it can assist the Court by providing a perspective that is distinct from that of any party.

For the foregoing reasons, the Washington Legal Foundation respectfully requests that it be allowed to participate in this case by filing the attached brief.

Respectfully submitted,

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January 19, 2005

QUESTION PRESENTED

Amicus curiae addresses the following issue only:

Is a defendant's statutory right to removal foreclosed solely because a defense common to both diverse and non-diverse defendants serves as the basis for a finding that the nondiverse party has been fraudulently joined?

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BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTERESTS OF *AMICUS CURIAE*

The interests of *amicus curiae* Washington Legal Foundation (WLF) are set forth in the motion accompanying this brief.[1]

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[1] Pursuant to Supreme Court Rule 37.6, WLF states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than WLF and its counsel, contributed monetarily to the preparation and submission of this brief.

STATEMENT OF THE CASE

Congress has determined that, in general, parties sued in a State court are entitled to remove the case to federal court if the federal district courts have original, diversity jurisdiction over the action. 28 U.S.C. § 1441. In determining whether diversity jurisdiction cases are removable, Congress has instructed courts to focus on the citizenship of only those defendants who have been "*properly* joined and served." *Id.* (emphasis added). This case tests whether the heretofore uniformly recognized definition of a "properly joined" defendant should be expanded substantially (as the Fifth Circuit held), thereby significantly impairing the ability of defendants to exercise their statutory right to removal -- a right that has existed throughout our nation's history.

This petition involves two lawsuits filed in Mississippi state court for injuries arising out of the vaccination of children. In *Stewart*, the plaintiffs (all Mississippi citizens) are the children's parents, seeking to recover medical expenses they incurred as a result of their children's injuries, as well as emotional distress damages. In *Collins*, the same plaintiffs are suing in their capacity as parents and next friends of their children, seeking to recover for their children's injuries. Each of the plaintiffs contends that the alleged injuries were caused by the preservative thimerosal, which until recently was an ingredient in virtually every vaccine administered in this country. Named as defendants are the alleged vaccine manufacturers; the alleged manufacturers of the thimerosal used in the vaccines; and the doctors, medical practices, and pharmacies who allegedly manufactured, distributed, and/or administered the vaccines (the "vaccine administrators"). The vaccine administrators are the only defendants who are citizens of Mississippi.

The defendants removed the two cases to the U.S. District Court for the Southern District of Mississippi, invoking diversity jurisdiction. The defendants contended that the citizenship of the vaccine administrators should be disregarded under the doctrine of "fraudulent joinder," *i.e.*, the vaccine administrators were not "properly joined" within the meaning of § 1441 but instead had been added as defendants in an effort to defeat the district court's diversity jurisdiction. The defendants alleged that the district court lacked subject matter jurisdiction over the vaccine administrators because the plaintiffs had failed to comply with the National Childhood Vaccine Injury Act of 1986 (the "Vaccine Act"), 42 U.S.C. § 300aa-1 *et seq.*[2] It is uncontested that if the citizenship of the vaccine administrators is disregarded, no defendant is a citizen of the same state as any of the plaintiffs.

On August 1, 2002, the district court issued orders denying motions to remand *Stewart*, Pet. App. 10a-14a, and *Collins*. *Id.* 15a-18a. Applying the fraudulent joinder doctrine, the court held that "there was no reasonable possibility that the plaintiffs could establish a basis for recovery against the resident defendants," and thus that the citizenship of those defendants should be ignored for purposes of determining diversity jurisdiction. *Id.* 11a. The district court subsequently granted the remaining defendants' motions to dismiss, finding that the plaintiffs' failure to exhaust Vaccine Act remedies barred their tort claims against the other defendants as well. *Id.* 6a-7a, 8a-9a. The correctness of the district court's exhaustion-of-remedies ruling is not at issue in this Petition.

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[2] The defendants contended that jurisdiction was barred by 42 U.S.C. § 300aa-11(a)(2)(A) because the plaintiffs had not yet exhausted remedies provided under the Vaccine Act, by filing a petition for compensation under 42 U.S.C. § 300aa-11(a)(1).

On appeal, the Fifth Circuit vacated the dismissal of the plaintiffs' claims and remanded with instructions that the district court remand both cases to the state court from which they were removed. *Id.* 1a-5a. The appeals court did not quarrel with the basic test adopted by the district court in deciding fraudulent joinder claims. However, the appeals court announced a previously unarticulated and significant limitation on such claims: a diversity case is not removable under a fraudulent joinder theory if the grounds for asserting fraudulent joinder is also a complete defense to the claims asserted against the nonresident defendants. *Id.* 4a-5a.[3] Asserting that the Vaccine Act exhaustion-of-remedies defense was equally applicable to the resident vaccine administrators and the nonresident defendants, the Fifth Circuit held that fraudulent joinder was inapplicable as a matter of law under such circumstances. *Id.* At no time did the court express any disagreement with the district court's finding that "there was no reasonable possibility that the plaintiffs could establish a basis for recovery against the resident defendants." *Id.* 11a.

The Fifth Circuit later granted rehearing *en banc* in *Smallwood* and stayed the mandate in this case pending the outcome of that rehearing. In September 2004, the Fifth Circuit voted 9-6 (with a 16th judge dissenting and concurring in the judgment) to stand by its original rationale. *Smallwood v. Illinois Central Railroad Co.*, 385 F.3d 568 (5th Cir. 2004) (*en banc*). The appeals court reiterated its long-standing "test for fraudulent joinder":

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[3] The appeals court based its rationale on a Fifth Circuit panel decision issued while this case was on appeal: *Smallwood v. Illinois Central Railroad Co.*, 342 F.3d 400 (5th Cir.), *vacated on reh'g en banc*, 355 F.3d 357 (5th Cir. 2003).

> [W]hether the defendant has demonstrated that there is no possibility of recovery by the plaintiff against the in-state defendant, which stated differently means that there is no reasonable basis for the district court to predict that the plaintiff might be able to recover against an in-state defendant.

Id. at 573.[4] The court went on to hold that fraudulent joinder nonetheless is *not* established if the rationale for asserting that there is no possibility of recovery by the plaintiff against the in-state defendant is equally applicable to the nonresident defendant -- thereby precluding recovery against the nonresident defendant as well. *Id.* at 574. The court held:

> In such cases, it makes little sense to single out the in-state defendants as "sham" defendants and call their joinder improper. In such circumstances, the allegation of improper joinder is actually an attack on the merits of plaintiff's case as such.

Id.[5]

In a dissent joined by six other judges, Judge Jolly argued that the majority's rule departed sharply from past Fifth Circuit understandings of "fraudulent joinder." *Id.* at 578 (Jolly, J., dissenting). Judge Jolly explained that prior case law, in discerning whether defendants had been fraudulently

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[4] The court also recognized a second means by which a defendant can establish fraudulent joinder: "actual fraud in the pleading of jurisdiction facts." *Id.* This alternative test is not at issue in this petition, nor was it at issue in *Smallwood*.

[5] A certiorari petition in *Smallwood* is also pending with the Court. *See* No. 04-831.

joined for the purpose of defeating diversity jurisdiction, looked not to the plaintiff's subjective intent but to an objective appraisal of whether there was any possibility of recovery by the plaintiff against an in-state defendant. *Id.* He said that the court's traditional objective test was easily applied and was based on the "reasonable and fair . . . assum[ption] that a lawyer, acting in accordance with the code of professional responsibility, will not sue someone against whom he has no reasonable basis of recovery, unless it is for an improper reason." *Id.* Judge Jolly criticized the majority for needlessly complicating the fraudulent joinder test by requiring district courts "to go one step further" than the traditional test, and "examine the entirety of the case" to see whether there exists a common defense that would negate a finding of fraudulent joinder. *Id.*

Following issuance of the *en banc Smallwood* decision, the Fifth Circuit denied pending petitions for rehearing and rehearing *en banc* in this case. Pet. App. 19a-22a.

REASONS FOR GRANTING THE PETITION

This case raises procedural fairness issues of exceptional importance. Congress established federal court jurisdiction based on diversity of citizenship in 1789 -- and has maintained it ever since -- because it wanted to provide out-of-state litigants with an impartial forum and feared that state courts tended to favor local citizens. It simultaneously established a right of removal from state court to federal court so that out-of-state defendants, not just out-of-state plaintiffs, would have access to a federal forum. This Court has long directed the lower federal courts to "'take such actions as will defeat attempts to wrongfully deprive parties entitled to sue in Federal courts of the protection of their rights in those tribunals.'" *Wecker v. National Enameling and Stamping Co.*,

204 U.S. 176, 182-83 (1907) (quoting *Alabama Great Southern Ry. Co. v. Thompson*, 200 U.S. 206, 218 (1906)). The federal appeals courts have carried out that directive by adopting strict "fraudulent joinder" rules that prevent plaintiffs from adding inappropriate parties to their suits as a means of destroying diversity and thereby preventing defendants from exercising their removal rights. The Fifth Circuit has now adopted a "common defense" exception that significantly narrows the scope of fraudulent joinder doctrine. Review by this Court is warranted to determine whether the "common defense" exception is faithful to that directive and whether it adequately protects out-of-state defendants' congressionally mandated right to secure an impartial forum by removing diversity cases to federal court.

Review is particularly warranted because the Fifth Circuit's "common defense" exception is so clearly in conflict with decisions from other circuits. The Fifth Circuit is in *direct* conflict with the Ninth Circuit on this issue, a fact acknowledged by the Fifth Circuit in its *Smallwood* decision. In their numerous decisions discussing fraudulent joinder doctrine, other federal appeals courts have explained the doctrine in much the same manner as did Judge Jolly in his *Smallwood* dissent, without ever so much as hinting that fraudulent joinder doctrine is inapplicable in cases involving a "common defense." Moreover, nothing in this Court's decisions supports or even suggests *Smallwood*'s constricted view of fraudulent joinder.

Review is also warranted because the Fifth Circuit's rule, by denying an impartial federal forum to many vaccine manufacturers, could have a significantly adverse effect on public health. One of the principal reasons that Congress adopted the Vaccine Act was its fear that high litigation costs were driving vaccine manufacturers out of the market and

leading to product shortages.[6] Yet, the Fifth Circuit's rule threatens a further increase in vaccine manufacturers' already high litigation costs by providing tort claimants a mechanism that will allow them to keep much vaccine-related litigation in state court, the forum in which out-of-state vaccine manufacturers fear they are most likely to experience biased treatment.

I. REVIEW IS WARRANTED BECAUSE THE DECISION BELOW CONFLICTS WITH OTHER APPEALS COURTS DECISIONS REGARDING THE SCOPE OF FRAUDULENT JOINDER DOCTRINE

Review of the decision below is warranted because it directly conflicts with a decision of the Ninth Circuit on an important issue of federal court procedure. Indeed, the Fifth Circuit has imposed a severe restriction on fraudulent joinder doctrine that has never previously been recognized in any federal appellate decision or any of the leading treatises on federal procedure.

The right of nonresident defendants to remove diversity jurisdiction cases from state to federal court is established by 28 U.S.C. § 1441. In determining whether diversity cases are removable, Congress has instructed courts to focus on the citizenship of only those defendants who have been "*properly* joined and served." 28 U.S.C. § 1441(b) (emphasis added). It is well accepted that a defendant is "improperly" or "fraudulently" joined if it has been included as a defendant for

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[6] Indeed, the nation has been experiencing a critical shortage of influenza vaccine for the past several months, a shortage attributed by many commentators at least in part to the uncertain litigation environment facing vaccine manufacturers.

the sole purpose of defeating any effort to remove the case to federal court. The Fifth Circuit in this case created a major exception to fraudulent joinder doctrine: a resident defendant will be deemed properly joined regardless how insubstantial the claims against him, if the basis for asserting that the claims are meritless provides a basis for asserting that the claims against the nonresident defendants are similarly baseless. Pet. App. 4a-5a.

In so holding, the decision below directly conflicts with the Ninth Circuit's decision in *Ritchey v. Upjohn Drug Co.*, 139 F.3d 1313 (9th Cir. 1998). *Ritchey* held that nondiverse defendants had been fraudulently joined, and thus that their presence did not preclude removal to federal court, because all claims against the nondiverse defendants were so clearly barred by the applicable statute of limitations. *Id.* at 1319-20. The court so held despite its full recognition that the statute of limitations also barred suit against the nonresident defendant that had invoked fraudulent joinder doctrine as its basis for removing the case to federal court:

> We recognize that it is, perhaps, slightly peculiar to speak of Dr. Dement and Stanford [the nondiverse defendants] as sham defendants because the statute of limitations bars a claim against them, when that would seem to lead to an argument that Upjohn itself is a sham defendant because the statute of limitations has also run against it. Nonetheless, the fact is that Ritchey did not state a cause of action against anyone, and his failure to state that cause of action against Dr. Dement and Stanford demonstrates beyond peradventure that they were sham defendants for purposes of removal.

Id. at 1320. In other words, the Ninth Circuit focused directly on the fact that all defendants shared a common defense, and

determined that that fact did not preclude the nonresident defendant from removing the case to federal court by invoking fraudulent joinder. The Fifth Circuit adopted its conflicting view with full recognition that the Ninth Circuit had reached a contrary result. *See Smallwood*, 385 F.3d at 575 n.21 (acknowledging conflict with *Ritchey*).

Moreover, the Fifth Circuit's "common defense" exception finds no support in other appeals courts' treatment of fraudulent joinder doctrine. Other circuits have routinely articulated a test for fraudulent joinder that is substantially similar to the Fifth Circuit's pre-*Smallwood* test: a resident defendant is deemed "fraudulently joined" -- and thus irrelevant in determining removability -- if there is no possibility that the plaintiff can recover from the resident defendant. *See Hartley v. CSX Transp., Inc.*, 187 F.3d 422 (4th Cir. 1999); *Jerome-Duncan, Inc. v. Auto-By-Tel, L.L.C.*, 176 F.3d 904 (6th Cir. 1999); *LeBlang Motors, Ltd. v. Subaru of Am., Inc.*, 148 F.3d 680 (7th Cir. 1998); *Filla v. Norfolk Southern Ry. Co.*, 336 F.3d 806 (8th Cir. 2003). Nothing in those courts' articulation of the test suggests that fraudulent joinder doctrine is inapplicable if all defendants share a common defense. Indeed, the opposite conclusion is much more logical: if fraudulent joinder depends on a showing that the plaintiff cannot possibly recover from the non-diverse defendant, then the existence of a common defense is irrelevant to the fraudulent joinder determination because the existence of a common defense does not make it any more or less likely that the plaintiff can recover from the non-diverse defendant.

The Fifth Circuit claimed support for its "common defense" rule in a Third Circuit decision. Pet. App. 4a (citing *Boyer v. Snap-on Tools Corp.*, 913 F.2d 108, 113 (3d Cir. 1990)). To the extent that *Boyer* supports the "common

defense" rule, it only deepens the split among the federal appeals courts. But the Fifth Circuit significantly overstated the extent to which *Boyer* supports its "common defense" rule. The Third Circuit's principal objection to the district court's invocation of fraudulent joinder doctrine was that the district court reached its conclusion – that the plaintiffs' claims against the resident defendants were without merit – only after delving deeply into factual bases for those claims. *Boyer*, 913 F.2d at 112.[7] The Third Circuit stated that if a court determines that claims asserted against the nondiverse defendant are "colorable," its inquiry should come to an end – the plaintiff has successfully refuted the fraudulent joinder claim without any need for the court to delve more deeply into the merits of those claims. *Id.* at 113.

The Fifth Circuit's reliance on *Chesapeake & Ohio Ry. Co. v. Cockrell,* 232 U.S. 146 (1914), is similarly misplaced. Petitioners explain at length why *Cockrell* is inapposite, so we will not repeat that explanation here. Suffice to say that *Cockrell*'s principal concern was in ensuring that a dispute over the propriety of a removal petition does not degenerate into a full-fledged trial on the merits. The basis for the assertion of fraudulent joinder in *Cockrell* was that the plaintiff's claim that he had been injured due to the negligence of the resident defendants was "false and untrue." The Court held that a general denial of the plaintiffs' claims was insufficient to establish fraudulent joinder, because resolution of the defendants' claim that there was no negligence "manifestly went to the merits of the action as an entirety" and

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[7] The court described the district court's inquiry as a "summary judgment type inquiry." *Id.*

thus could only be resolved in connection with a full-fledged trial, not at the removal stage. *Cockrell*, 232 U.S. at 153.[8]

Courts are no doubt well advised to conserve their resources by limiting the scope of any fraudulent joinder inquiry. As the Fifth Circuit recognized, a defendant making a fraudulent joinder claim faces a heavy burden of proving that there is "no possibility" of recovery against a resident defendant and that any such proof must be established in connection with "a summary process" that does not "entail substantial hearings." *Smallwood,* 385 F.3d at 574. But the Fifth Circuit erred in reading anything more into *Cockrell* than a desire to prevent trial-type proceedings in connection with removal petitions; at the very least, review is warranted to determine whether the Fifth Circuit properly relied on *Cockrell.*

The rule adopted by the Fifth Circuit has little to recommend it. As Judge Jolly pointed out in his *Smallwood* dissent, the "common defense" rule complicates a fraudulent joinder determination considerably, because judges in the Fifth Circuit must now examine the entire case to determine whether defenses available to the resident defendants also apply to the nonresident defendants. *Smallwood,* 385 F.3d at 578 (Jolly, J., dissenting). That determination will be made considerably

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[8] If the Fifth Circuit's interpretation of *Cockrell* were as self-evident as the Fifth Circuit suggests, then one could have expected commentators to have arrived at a similar conclusion. But as Judge Jolly pointed out in dissent, "Equally revealing of the novelty of the majority's position is that neither WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE nor MOORE'S FEDERAL PRACTICE -- the two most authoritative treatises on federal practice -- cite *Cockrell* as relating to such a theory as 'common defense' or, for that matter, even intimates that such a rule exists." *Smallwood,* 385 F.3d at 580 (Jolly, J., dissenting).

more complicated if the nonresident defendants choose to rely on some other defense; courts will then be placed in the unenviable position of attempting to determine whether an unasserted defense is nonetheless meritorious.[9]

Moreover, it makes little sense to allow a claim to go forward in a remanded proceeding if the trial court is convinced that the claim is utterly lacking in merit. As Petitioners point out, the courts are *unanimous* in rejecting one of Respondents' principal responses to the failure-to-exhaust-remedies defense: that exhaustion is not required because thimerosal is a "contaminant or adulterant" within the meaning of 42 U.S.C. § 300aa-33(5). Reply Brief 2-3. The Fifth Circuit did not dispute this unanimous consensus. Indeed, it recently characterized as "unremarkable" the proposition that thimerosal-related injuries, allegedly occurring as a result of a vaccine, are subject to the Vaccine Act's exhaustion requirements. *Moss v. Merck & Co.*, 381 F.3d 501, 504 (5th Cir. 2004). Yet, the Fifth Circuit held that the district court erred in dismissing Respondents' claims based on failure to exhaust remedies -- based solely on the Fifth Circuit's finding that *all* defendants could assert a failure-to-exhaust defense. Review is warranted to determine whether that approach to removal jurisdiction is consistent with either congressional intent or common sense.

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[9] In such circumstances, the parties are likely to reverse their normal arguments. The plaintiff would be tempted to admit that the defense raised on behalf of the resident defendants has considerable force when applied to the nonresident defendants, while the nonresident defendants asserting fraudulent joinder would be tempted to assert the opposite position.

II. REVIEW IS WARRANTED BECAUSE THROUGHOUT AMERICAN HISTORY THE RIGHT OF REMOVAL HAS PLAYED A VITAL ROLE IN ENSURING PROCEDURAL FAIRNESS TO OUT-OF-STATE LITIGANTS

Review is also warranted because of the important role that the right of removal has played in the civil justice system throughout our nation's history. Given the important role that the right to remove cases to federal courts has played in ensuring that out-of-state defendants have available to them an impartial judicial forum, the Court should carefully examine any efforts by the federal appeals courts to cut back on removal rights.

The need to protect out-of-state litigants from the biases of state courts was widely discussed at the time the Constitution was being drafted. For example, James Madison argued that "a strong prejudice may arise in some states, against the citizens of others, who may have claims against them." 3 Jonathan Elliot, THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA, IN 1787 533 (2d ed. 1836). Similar, Alexander Hamilton argued that federal courts should be granted jurisdiction over cases between citizens of different states, because such a court was "likely to be impartial between the different states and their citizens, and which, owing its official existence to the union, will never be likely to feel any bias inauspicious to the principles on which it is founded." THE FEDERALIST NO. 80, at 403 (Alexander Hamilton) (Garry Wills ed., 1982). As ratified, the Constitution explicitly included within the "judicial Power" cases "between Citizens of different States." U.S. Const., Art. III, § 2.

The Judiciary Act of 1789 granted diversity jurisdiction to the federal courts. But those concerned about the problem of biased state courts realized that diversity jurisdiction could not by itself fully address the problem: it provided no protection to nonresident defendants sued in state court. Section 12 of the Judiciary Act addressed that latter concern by authorizing a nonresident defendant sued by a resident defendant in state court to remove the case to federal court. Judiciary Act of 1789, ch. 20, § 12, 1 Stat. 73, 79-80. The right of removal "has been in constant use ever since." *Tennessee v. Davis*, 100 U.S. 257, 265 (1880). This Court has long recognized that the right of removal was intended to grant defendants the same protections from local prejudice in state court that diversity jurisdiction grants to plaintiffs:

> The constitution of the United States was designed for the common and equal benefit of all the people of the United States. The judicial power was granted for the same benign and salutary purposes. It was not to be exercised exclusively for the benefit of parties who might be plaintiffs, and would elect the national forum, but also for the protection of defendants who might be entitled to try their rights, or assert their privileges, before the same forum.

Martin v. Hunter's Lessee, 14 U.S. (1 Wheat) 304, 348. (1816).

Congressional concern over state court bias has not decreased over time. Indeed, both the Senate Judiciary Committee and the House Judiciary Committee recently issued reports decrying the unwillingness of some state courts to provide basic fairness to out-of-state defendants in nationwide class actions and recommending that class action defendants be given greater rights to remove such cases to federal court on

the basis of diversity jurisdiction. S. Rep. 108-123, Senate Judiciary Committee, The Class Fairness Act of 2003, 108th Cong., 1st Session (2003) at 5-6, 11; H. Rep. 107-370, House Judiciary Committee, The Class Action Fairness Act of 2002, 107th Cong., 2d Sess. (2002) at 7, 8, 11.

Congress has also taken steps to ensure that procedures governing removal are uniform throughout the country. For example, 1948 and 1949 legislation established uniform time periods for the filing of removal petitions. *See generally Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344 (1999).

By cutting back on the right to remove to federal court cases filed in state courts in Louisiana, Mississippi, and Texas, the Fifth Circuit's decision undermines the uniformity of removal procedures that Congress sought to impose. Review should be granted to restore that uniformity, and also to examine whether – in light of Congress's long commitment to providing nonresident defendants with a federal forum – it really intended the severe curtailment of removal rights effected by the Fifth Circuit.

III. REVIEW IS WARRANTED BECAUSE THE DECISION BELOW COULD ADVERSELY AFFECT PUBLIC HEALTH

Review is also warranted because the Fifth Circuit's rule, by denying an impartial federal forum to many vaccine manufacturers, could have a significantly adverse effect on public health. One of the principal reasons that Congress adopted the Vaccine Act was its fear that high litigation costs were driving vaccine manufacturers out of the market and

leading to product shortages.[10] Yet, the Fifth Circuit's rule threatens a further increase in vaccine manufacturers' already high litigation costs by providing tort claimants a mechanism that will allow them to keep much vaccine-related litigation in state court, the forum in which out-of-state vaccine manufacturers fear they are most likely to experience biased treatment.

As then Chief Judge Breyer explained, "an important federal purpose" of the Vaccine Act was "to free manufacturers from the specter of large, uncertain tort liability, and thereby keep vaccine prices fairly low and keep manufacturers in the market." *Schafer v. American Cyanamid Co.*, 20 F.3d 1, 4 (1st Cir. 1994) (Breyer, C.J.). A 2002 General Accounting Office study indicated that recent childhood vaccine shortages are at least partially attributable to liability concerns and litigation defense cost. GAO, *Childhood Vaccines: Ensuring an Adequate Supply Poses Continuing Challenges* (Sept. 2002). In a recent speech, Senate Majority Leader Bill Frist, a practicing doctor, noted the importance of developing new vaccines to guard against the growing threat of bioterrorism but warned that the threat of manufacturer liability has hindered that development effort. 148 Cong. Rec. S11169-01, S11176-S11178.

The Fifth Circuit's decision has served to stoke the litigation liability concerns of vaccine manufacturers. It makes it much more difficult for nationwide manufacturers to remove lawsuits to federal court when they are sued in state courts by citizens of that state. Such increased liability concerns will

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[10] Indeed, the nation has been experiencing a critical shortage of influenza vaccine for the past several months, a shortage attributed by many commentators at least in part to the uncertain litigation environment facing vaccine manufacturers.

cause manufacturers to be even more reluctant to remain in the vaccine manufacturing field, thereby exacerbating current vaccine shortages. In light of the significant public health and national security concerns raised by that decision, review is warranted to determine whether Congress really intended to limit removal rights along the lines outlined by the Fifth Circuit.

CONCLUSION

The Washington Legal Foundation respectfully requests that the Court grant the petition for a writ of certiorari.

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